Q. Well, you must have met somebody in connection with the sales' end of this platinum transaction.

A. Definitely not, just here to see Marty.

Q. Did you go to any social engagements with Marty while you were in San Diego other than just going out to eat?

A. Other than to eat, no.

Q. Where did you stay in San Diego?

A. I don't remember.

Q. Did you get any visitors at the motel?

A. I don't remember, I fell asleep.

* * * *

Q. What happened when you went to Tijuana?

A. Nothing.

Q. Where did you go in Tijuana?

A. I don't know where we went, I don't know Tijuana.

Q. What type of place did you go to, a restaurant or to a home or another business house or bank or what type of place did you go to?

A. It wasn't a bank. It wasn't a restaurant, we walked into a door, I sat down on a couch and I fell asleep.

* * * *

Q. Did you talk to anybody at the house?

A. No, sir.

* * * *

Q. . . . Now, isn't it a fact, sir, that really the reason you came out to California was to act as sort of a body guard in case someone tried to steal some money from Mr. Goldman, wasn't that the reason?

A. No sir, Marty Goldman called me up and asked me to come down.

* * * * *

Q. What were the discussions about?
A. I don't know.

* * * *

Q. Have you gone by any other name than Michael Catalano this year?
A. Have I used any other name but my name, no.
Q. You just go by the name of Catalano?
A. I go by Mike, and my friends call me Mike.
Q. And if anybody asks you your name, you say Catalano?
A. Yes.[2]

2. The testimony at trial revealed a complicated scheme to purchase platinum at a cost substantially below the world market price (Tr. 161). Broox Hoyt, a broker, introduced Henry Williams, and Seymour Flax to Norman Natividad of Tijuana. Natividad was to supply the platinum for $100,000 (Tr. 86-87). Williams and Flax convinced Martin Goldman of New York to supply the necessary $100,000, which he procured through his father's corporation (Tr. 87, 109-162).

In April 1968, Goldman, Williams, Flax and attorney Arthur Singer flew to California to negotiate for the platinum (Tr. 163). Goldman offered a certified check as proof that he had the $100,000; however, Natividad insisted upon cash (Tr. 165-166). At that point, Goldman telephoned petitioner in New

[2] The indictment containing this allegedly perjurious testimony was read to the jury (Tr. 26-29, 341-343). The parties stipulated that the grand jury transcript containing these statements was a true copy of the statements and events which took place at the grand jury hearing; it was admitted into evidence (Tr. 147-148).

York and asked him to fly out to California (Tr. 165). Goldman testified that he wanted someone he could trust to watch the money (Tr. 168-170), and that petitioner had come to California to act as sort of a bodyguard in case someone tried to steal the money (Tr. 196).

When petitioner arrived in Los Angeles, Goldman introduced him to Williams and others as "Mike Mitty" (Tr. 67). Shortly thereafter, Williams complained that he no longer liked the deal and wanted to "bow out". Petitioner responded, "You can't bow out. You have agreed to go through with it. You have to go through with it or else" (Tr. 90).

The certified check was converted into cash at a Los Angeles bank; petitioner instructed the bank employee to put the money into three separate packages and then to place the packages into one envelope (Tr. 270). At petitioner's later suggestion, one bundle of money was carried by him, one bundle by Goldman, and one by Aaron Friedman, Goldman's uncle (Tr. 271).

Later the same day, petitioner, Williams, Goldman and Friedman drove to a restaurant in Chula Vista, California, where the first attempt to transfer the money for the platinum took place (Tr. 67-68, 133). Petitioner and Goldman gave all of the money to Williams, who was to wait at the restaurant for the seller's representative, Juan (Tr. 67-68). This meeting was unsuccessful (Tr. 68).

On May 2, 1968, Goldman, petitioner and others went to the Kings Inn Motel in San Diego (Tr. 69, 134). Goldman introduced petitioner to Broox Hoyt

as "Mike Catty," and told Hoyt that petitioner was there to see that nobody got hurt (Tr. 100-101). From the motel, Goldman telephoned Natividad and explained that Juan and Williams had never met at Chula Vista (Tr. 185). It was then arranged that Juan and Williams would meet that evening, in front of the U.S. Grant Hotel in San Diego. Petitioner suggested that three cars be used, with him and Friedman in the lead car, Williams and Juan in the middle car and Goldman and Hoyt in the last (Tr. 102, 113).[3]

Before leaving the motel, petitioner and Goldman again gave the money to Williams (Tr. 69). The three cars proceeded to the hotel where Williams waited for Juan as planned (Tr. 69). Juan arrived at the hotel, opened the trunk and said "Here is the platinum". He instructed Williams to put the money in the trunk and Williams did so. Juan and Williams got into the car and drove around the block. Juan said he had to make a call and went to a phone booth. He returned to the car and told Williams that he was wanted on the phone. At first Williams refused to leave the car, but at Juan's insistence, he and Juan walked to the booth. Juan ran back to the car and Williams chased him. Juan then threatened to kill Williams, drove off with the money and the metal, and was not seen again (Tr. 69-70). Petitioner, who

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[3] According to the plan, Williams was to stand in front of the hotel and wait for Juan to arrive in a red car. Williams would display the cash and Juan would display the metal. Then all three vehicles would proceed to the motel where an assayer would inspect the platinum and the transfer would occur (Tr. 69, 187).

momentarily gave chase, returned and said to Friedman, "I lost him" (Tr. 135).

3. Later that evening at the Kings Inn Motel, petitioner told Hoyt that his real name was "Catalano" not "Catty" (Tr. 104). He questioned Hoyt concerning his background, the background of Natividad, and the possibility of fraud regarding the loss of the money. Petitioner told Hoyt that he felt somewhat responsible for the loss of the money, and that he would do everything he could to see that the money was returned to Goldman (Tr. 105).

The following morning petitioner, Goldman, Hoyt, Williams and Flax went to Natividad's home in Tijuana. They all went upstairs where Natividad informed them that Juan had escaped to Cuba (Tr. 70-71). A discussion then took place, in which petitioner participated, concerning possible methods of recovering the money (Tr. 71-72). Hoyt testified that petitioner was out of his sight no more than ten-to-fifteen minutes at Natividad's house (Tr. 106-107). Neither Hoyt nor Williams saw petitioner sleep at the house (Tr. 72-73, 106-107).

Petitioner and the others subsequently left Tijuana and went to the San Diego Airport. Petitioner told Williams that he and Flax were each responsible for one-third of the loss and that, if it was not paid shortly, Williams had better look behind him when he walked down the street (Tr. 73-74).

4. At trial, petitioner testified that he did not know that he was involved in any way with platinum while he was in California or Tijuana (Tr. 243). He admitted, however, that by the time he entered

the grand jury room he knew the money had been lost in a platinum transaction (Tr. 282-283).

ARGUMENT

1. Petitioner contends here, as he did below, that he was entitled to have his attorney present with him inside the grand jury room. Rule 6(d), Fed. R. Crim. P., provides however, that only "[a]ttorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer * * * may be present while the grand jury is in session * * *." It is conceded that petitioner was informed of his right to be advised by an attorney, and of his privilege against self-incrimination (Pet. 34).[4] The courts have uniformly held that in such circumstances a witness is not entitled to have counsel appear with him before the grand jury. See *Hannah* v. *Larche*, 363 U.S. 420, 497-499 (Douglas, J., dissenting); *United States* v. *Levinson*, 405 F. 2d 971, 979-980 (C.A. 6), certiorari denied *sub nom. Strang* v. *United States*, 395 U.S. 906. The grand jury appearance is not, as petitioner urges, equivalent to custodial interrogation.

2. Petitioner also takes issue with various portions of the trial court's charge to the jury.

a. He claims that it was error to instruct the jury that all of the grand jury testimony referred to in

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[4] Accordingly, there is no substance to petitioner's claim that the purpose of his grand jury interrogation was to force him to incriminate himself in connection with a later indictment in New York. Nor is there any evidence that the purpose of the grand jury investigation was to entrap petitioner or lay a foundation for perjury proceedings.

the indictment was material to the perjury charge.[5] His contention is not well taken. The grand jury investigation concerned possible violations of federal law connected with the alleged loss of $100,000 in the platinum transaction. The questions set forth in the indictment dealt directly with petitioner's possible involvement, his knowledge of other parties involved and his knowledge of the details of the transaction. His answers reflected his clear effort to disassociate himself from the deal entirely. None of this testimony was immaterial to the issue of perjury, and thus the court's instruction was proper.

b. Nor do we think the court can be faulted for not instructing the jury to specify which statements it found to be false. See *United States* v. *Jones*, 425 F. 2d 1048, 1057 (C.A. 9) and cases there cited. Petitioner requested no such instruction at trial. Moreover, there is no room on this record for petitioner's claim of possible jury confusion from the court's remarks. The trial judge not only read to the jury that portion of the indictment containing the grand jury testimony, and separated each group of questions by an "and" (Tr. 341-343); it also summarized the government's contentions with respect to each allegedly false statement. The jury was instructed on two occasions that it could find one or more of petitioner's eight statements to be false, but that it must unanimously agree on at least one (Tr. 345, 351-352). Further clarification was plainly unnecessary. See

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[5] He does not dispute that the issue of materiality is for the court. *Sinclair* v. *United States*, 279 U.S. 263.

Vitello v. *United States*, 425 F. 2d 416 (C.A. 9), certiorari denied, 400 U.S. 822.

c. To be sure, the trial judge refused to give petitioner's requested instruction that, if the jury found that he had sworn falsely "inadvertently, inconsistently, or carelessly" or with a mistaken but honest belief as to the truth of his testimony, then he must be acquitted (Tr. 293-295). See *Spaeth* v. *United States*, 218 F. 2d 361, 363 (C.A. 6). But, the court carefully defined the terms "wilfully" and "knowingly" (Tr. 338-339), and charged that "[i]f there is a lack of consciousness of the nature of the statement made, or it is inadvertently made, or there is a mistake of its import, then there is no corrupt motive such as is necessary to constitute the crime of perjury" (Tr. 346). Thus, the jury was accurately informed with respect to what the government had to prove to sustain a finding of requisite intent for perjury.[6]

3. Petitioner's additional contention that his conviction is not supported by the evidence is belied by the record. As indicated above, the government established that petitioner traveled to San Diego in connection with the transaction. In addition two govern-

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[6] Petitioner's reliance (Pet. 50) on *Beckanstin* v. *United States*, 232 F. 2d 1 (C.A. 5) is misplaced. *Beckanstin*, as well as a long line of other cases, supports the trial court's statement of law (232 F. 2d at 4). See *United States* v. *Rose*, 215 F. 2d 617 (C.A. 3); *Fotie* v. *United States*, 137 F. 2d 831 (C.A. 8); *Smith* v. *United States*, 169 F. 2d 118 (C.A. 6); *Maragon* v. *United States*, 187 F. 2d 79 (C.A.D.C.), certiorari denied, 341 U.S. 932; see also *Masina* v. *United States*, 296 F. 2d 871, 879 (C.A. 8).

ment witnesses testified that petitioner actively participated in the discussion at the houses in Tijuana, and neither saw petitioner sleep, as he had claimed before the grand jury; he was out of sight for only minutes. Each testified that petitioner was introduced to them by a name other than Catalano.

Petitioner's clear participation in the platinum purchase, when compared to his evasive answers before the grand jury denying such participation, provided ample basis for the jury to conclude that his untrue testimony had been knowingly and willfully made.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Acting Assistant Attorney General.

ROGER A. PAULEY,
ROBERT J. VEDATSKY,
Attorneys.

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